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Certification Schemes and Labelling as Corporate Governance: the Value of Silence

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Introduction

If we were to walk along the shelves of any large-scale retailers in the Global North we would notice that they are constantly refilled with products that come with small logos attached. Images of trees, frogs and fish are increasingly appearing on packaging, labels and websites, together with the words like ‘organic’, ‘bio’ and ‘sustainable’. Although these pictures and codes seldom offer an explanation of their meaning and instead rely on the appeal of a design and its catchy acronym, they seem capable of persuading wealthy and conscious consumers of the reasonableness and legitimacy of their claim. Moreover, they are often perceived as a sophisticated and effective source of buyers’ collective power.

From the point of view of the market–consumer relationship, however, the graphical representation of the (often not specified) standard operates as the visible sign of the not-so-visible mechanism of capitalist expansion and consolidation of transnational value chains. In particular, the little frog associated with the protection of rain forests has three main functions: from a governance perspective, it produces in customers the expectation and the belief that they are purchasing products that have not been obtained through environmental destruction, slavery or other forms of rampant exploitation; economically, it justifies the extra premium that is generally paid in order to have access to a ‘superior’ class of commodities; morally, it convinces the broader public that a change in the way in which businesses operate shall not be achieved by acting against corporate actors or by sanctioning those who release negative externalities, but rather by rewarding those businesses that openly declare that they are following ‘higher standards’.

However, this article claims that these certifications and ecolabels are based on an inherent contradiction that leads to often unnoticed consequences. Despite the underlying assumption that these mechanisms of corporate governance lead to more transparency in the market, it is a matter of fact that sustainability statements appear only on some products. As a consequence, labelled goods are transformed into the exceptional and unique. On the other hand, images and statements that highlight the exploitative or

unhealthy nature of products – what could be called ‘non-ecolabels’ – are almost non-existent in the market and have been strongly opposed by multinational corporations operating in different sectors (from cocoa to computers).¹ In the absence of mandatory requirements of negative disclosure, violations and exploitations that occur outside of the ‘sustainability sphere’ are invisible and normalized by the multiplicity and complexity of transnational production. Therefore, logos and no-logos must be understood as the two sides of the same exploitative system: two mutually supportive sources of value that depend on each other and foster the reproduction of transnational corporate capitalism.²

Certification and ecolabelling as mechanisms of corporate regulation

The worldwide legal order is increasingly filled with national and international laws that guarantee rights and protect individuals. However, the history of the state–capital–people interaction is riddled with denial of justice, uncompensated exploitation of labour and natural resources and the growth in the gap between law in books and law in action. This is evident in the Global South, where land is constantly enclosed and communities evicted, where people live in slums deprived of basic services, the environment is constantly treated as a coffer for rich investments, and production chains thrive among sweatshops and quasi-bond labour.³ As a response to the expansion in ‘non-internalized negative externalities’, public and private actors have proposed legal and quasi-legal solutions that aim to improve the way in which businesses operate. Often conceived as separated and belonging to two different spheres, these mechanisms of corporate governance and corporate accountability are both based on the assumption that exploitation is the product of misbehaviour and not an inherent characteristic of the system of production.

On the public side, most attention has been directed towards the establishment of access to justice programmes, legal empowering campaigns, and the strengthening of judicial autonomy and courts’ independence that can be financed with grants, education and new facilities. The idea is that aware communities and an efficient judicial system can enforce legal order and discipline, eventually conducting business practices under the framework of legality. Related to that, international and national civil society have been increasingly focusing on the use of human rights law to construct legal strategies and file law suits within and outside the national jurisdiction where the violations occur, including by means of

multiple actions undertaken in different legal orders.⁴

However, it is the area of private and quasi-private responses as post-national mechanisms of global governance that has attracted most of the attention and the majority of the available resources (see e.g. Eslava, 2008; Shamir 2008; 2010; Dolan and Johnstone-Louis, 2011; Rajak, 2011; Ferrando, 2014).

Among the many forms that these mechanisms of self-governance have adopted, certification schemes and ecolabelling are those that are increasingly gaining space and visibility. A typical example of a well-known labelling scheme is Fairtrade, which consists of a set of rules and standards that, when respected, provide sellers of goods and products with the opportunity to display a logo on the packaging of the final product, on their website or in their communications.

Fully informed by the idea of markets as competitive and independent arenas for business, certifications and labels are systems of corporate social responsibility and value chain control based on the idea of ‘regulation by information’ as a private alternative to direct control. According to the underlying paradigm, ‘[l]ogos, labels and product claims are direct communication channels to consumers. They can help consumers assess and compare products on the market or guide them towards more sustainable, healthy and responsible choices’ so as to favour those businesses and products that, for example, help conserve scarce resources, preserve biodiversity, or provide a living wage for workers (European Commission, 2012: 25).

The proliferation of certification and ecolabel

The use of certifications and labels is embedded in the ideological paradigm that represents corporate social responsibility as a win-win-win profit-maximization strategy. In this framework, they are an expression of the triple hope that: (wealthy) consumers will be offered goods that have an extra quality compared to the competitors; (some lucky) dolphins, turtles and trees will be spared from the process of continuous exploitation and commercialization; and (oligopolistic) issuers and producers that disclose their positive conducts to concerned consumers will be rewarded with higher sales. In an era of neoliberal solutions to neoliberal contradictions, it should not come as surprise that certification schemes and ecolabelling are proliferating and increasingly utilized as a marketing strategy.

Certainly, consumers interested in going beyond logos and names would quickly realize that not all certification and labelling schemes are the same. In particular, each scheme has ‘its own criteria, assessment processes, levels of transparency and sponsors’ (Washington and Ababouch, 2011). For example, the Fairtrade protocol and its logo emerged from the collaboration between Mexican coffee farmers and Dutch individuals, whereas the Roundtable on Sustainable Oil Production and the Better Sugar Initiative (Bonsucro) are membership-based associations that are financed by their business members and overseen by multi-stakeholder groups involving nongovernmental organizations (NGOs), industry members and representatives of civil society.

In the fishing sector alone, the proliferation of ecolabels has seen private actors, NGOs and public authorities launching multiple certification schemes and labelling regimes that differ in scope, structure and objective. In particular, multi-stakeholders initiatives that involve corporations and civil society are the most diffused. Among those, the blue fish of the Marine Stewardship Council, which is considered to be the most utilized and recognizable in the industry, began as a multi-stakeholder certification scheme set up by the World Wildlife Fund and Unilever in 1997⁵ but now claims to be a legally and financially independent non-profit scheme that receives its funds from grants, private foundations and the royalties paid by companies for the use of its logo on a product.

However, companies and public authorities have not missed the opportunity to launch their own schemes. On the industry side, Pescanova, one of Europe’s largest fishing companies, has launched its own fully private system of logos and certifications. A proportion of the fish that it catches and distributes is, in fact, labelled with an image created by the company that represents the claim that it has been internally certified as caught in accordance with the company’s own code of conduct. In the public sector, one of the most talked-about cases is that of the government of France, which in 2008 created its own national certification scheme and ecolabel (Label Rouge) so that ‘sustainable’ French producers could be more easily identified and obtain a double competitive advantage in the French market over non-certified and foreign-certified products.⁶

As the reader is certainly aware, the exponential diffusion of these instruments has been explored in

several studies and investigations that have underlined the various reasons why private certification schemes and labelling may be nothing more than a travesty of corporate governance. For example, concerns have been raised with regards to the conflicts of interest that are inherent in industry-based mechanisms where the controlled is also the controller or financially linked to the controller; the massive presence of corporate representatives on the boards of trustees of certification and labelling schemes; the potential for companies to have different lines of production and continue profiting from the sale of cheaper and non-compliant products; and the lack of real and transparent information concerning internal procedures and the meaning of the labels.

Similar scepticism has arisen around the issue that certifications could legitimate the productivist and exploitative status quo by favouring ‘greenwashing’ through the selection of vague and non-mandatory standards.⁷ For example, the World Rainforest Movement (WRM) is at the forefront of a campaign against the certification scheme of the Forest Stewardship Council (FSC) which is accused of legitimizing land-grabbing, forest degradation, water depletion and favouring greenwashing by the companies that proudly display its logo.⁸ Moreover, there have been several cases that demonstrate the fact that certifications and ecolabels are sometimes defined and enforced without proper information from and involvement of the local producing communities. In addition, because of problems with compatibility between labels and transnational chains of production, violations of standards are difficult to discover/monitor for the consumer relying on a particular label.

Vietnam, for example, is the second largest exporter of coffee in the world and is a preferred source for Robusta beans used to produce instant coffee. However, its production takes place on small (1 to 5 hectare) farmsteads scattered all over the landscape whose harvests are collected by intermediaries and then sold to other – larger – operators along the chain. Such fragmentation and hierarchization of actors reduce the bargaining power of local producers vis-à-vis larger intermediaries and increase the distance between consumers and agricultural production. As a consequence, there is a very limited possibility of accurately knowing where and how our mug of instant coffee is produced; or of checking that the ‘organic’ or ‘bio’ labels are actually representative of the reality of production; or that tangible and

effective countermeasures are adopted when communities or their eco-systems are affected by the intensification of land exploitation through the use of excessive fertilizers – as in the case for Vietnamese coffee.⁹

More recently, representatives of international organizations and global value chain scholars have also criticized the multiplication of certification schemes and the adoption of stringent production standards because of the oligopolistic effects that they produce and their negative implications on small producers and weaker actors in the chain (Vorley and Fox, 2004; Vandermeer, 2006; Chemnitz et al, 2007; De Schutter, 2009; Maertens and Swinnen, 2009; Asfaw et al, 2010). Especially in the agrifood sector, the costs of compliance (the complexity and the timing required by some retailers and certification mechanisms) can seldom be sustained by small-scale producers and therefore increase their dependency on large-scale players and favour the concentration of market shares. Despite the generalized perception, it would be a mistake to consider that certification and ecolabels are always pro-farmers and as such redistribute value downward along the structure of production. On the contrary, the opposite is often true (Swinnen et al, 2013).

Certifications between visibility and invisibility

Despite the validity and correctness of these critiques, there is some space for ecolabelling and certifications to improve the way in which production takes place, labour is treated, the environment is protected and value is distributed along the chain. However, it appears clear that this transformative opportunity conflicts with the profit maximization purpose and strategy of value accumulation that is pursued by transnational capital. For this reason, the next two sections of this short article focus on the partiality of the current certification paradigm and its role in reproducing global exploitative capitalism. In particular, they offer some preliminary thoughts on the double strategy adopted by some multinational enterprises: on the one hand, transnational capital supports transparency and certification schemes whenever sustainable features of production chains are disclosed; on the other side, it fiercely opposes such schemes whenever they are capable of making exploitation less invisible.

Instead of talking about labels and certifications that consumers find on some products that they buy, I

have decided to focus on those images and statements that buyers do not find and that, in the absence of a widespread and strong public campaign, they will never find. All around the world, transnational corporations that praise the regulatory power of competitive markets and that rely on labels to conduct dialogue with ‘informed consumers’ have been politically and legally opposing public laws requiring them to inform consumers about their products’ links with, for example, worldwide slavery, guerrilla movements in Congo or genetically modified organisms (GMOs). As evident from the example of ‘conflict minerals’ discussed below, when disclosure concerns a marketable characteristic of the good, corporations are claiming that it is important to provide this information to consumers so that they can properly understand the quality of what they are consuming and reward virtuous value chains. However, when the same companies are asked by civil society (or required by law) to disclose information that may negatively impact upon their sales, consumers are characterized as being incapable of understanding such information and any form of transparency is strongly opposed.

As a consequence of this – not so surprising – discrepancy, goods that are obtained in circumstances that respect peoples’ dignity and are in line with environmental benefits are transformed into exceptional products around which marketing divisions can set up a vanity fair. Thus, the graphic representation of sustainable practices, by means of trees, frogs, and ‘GMO-free’ labels increasingly appear on packages because they can be exploited to generate extra margins. At the same time, however, violations, contaminations and deprivations are hidden among all the other non-special products that can be found in any supermarket. As a consequence of this silence, the ‘real costs’ of goods are hidden and problems at the root of the unsustainability of global production, which ought to be under the spotlight and openly exposed, are barely distinguishable to consumers (even the most concerned ones) in their daily shopping. In the absence of investigations and mandatory labelling requirements, exploitation is hidden from sight in the multitude of goods and, thus, is normalized.

In the neoliberal world of communicative illusion, final consumers are exclusively exposed to glittering information about those (few) products that are obtained – at least on paper – in compliance with fundamental human rights, the needs of the environment or without the use of genetically modified crops

because there is an added incentive to buy them. On the other hand, information that may produce the opposite incentive and dismantle the idea of empowered consumerism is hidden, camouflaged in supermarket aisles among other goods and services and stripped of any clear indication that may challenge the marketable truth incorporated in pro-consumer labelling and certifications.

If that is the case, it would be wrong to think that logos and no-logos are representative of two different forms of production and two different economic systems. On the contrary, they are complementary conditions of neoliberal capitalism. Through labels and certifications capital can extract ‘bright value’ by transforming socially responsible activities into exceptional practices, flagging the positive aspects of chains of production, and utilizing transparency as a marketing vehicle. At the same time, the absence of labels and the creation of an undistinguished basket of ‘normalized products’ facilitate the covering-up of inconvenient linkages, create confusion in consumers by assimilating exploitative products with ‘anything that is not specifically indicated as sustainable’, and help to accumulate ‘dark value’ by means of ignorance, lobbying and legal attacks (Clelland, 2014).

Neoliberal wonderland: the unconstitutionality of negative certification

The economic relevance that companies attribute to partial truths, silence and selective information is exemplified by the claim filed in the Court of the District of Columbia by the (US) National Association of Manufacturers (NAM) et al. against the Security and Exchange Commission (SEC).¹⁰ At the centre of the judicial quarrel was the alleged violation of the plaintiff’s freedom of speech committed by the disclosure requirements introduced by section 1502 of the Dodd-Frank Act and the 2012 regulation of the SEC.¹¹ Although the Bill had as its objective to regulate financial actors and avoid a new transnational meltdown like the collapse of 2008–2010, it also contained two public interventions whose objective was to indirectly intervene in the humanitarian crisis in the Democratic Republic of Congo (DRC) and reduce investors’ risk by requiring those companies filing reports with SEC to disclose specific information concerning their supply chains.¹²

Inspired by the paradigm of ‘regulation by information’, aware of the ubiquity of ‘conflict minerals’ in everyday life,¹³ and confident about the power of consumers and businesses to determine and direct

companies' sourcing practices through their purchasing behaviours, US Congress and the SEC crafted a sophisticated mechanism of annual due diligence and auditing requirements aimed at identifying and singling out products not found to be 'DRC conflict free'.¹⁴ Without entering into too much detail, the structure of the regulation requires companies:

... first, to figure out if their products contain conflict minerals and, second, to determine where those minerals come from. It also wants companies to report how they go about this exercise, and for those companies potentially sourcing conflict minerals from militarized mines to list the products in which such minerals are contained. (Schwartz, 2015: 7).

Therefore, if companies have reason to believe that their products contain minerals originating from the Congo region, they are required to conduct due diligence 'on the source and chain of custody' of such minerals. At that point, if companies determine that minerals are *not* from the Congo region they only have to briefly describe the due diligence efforts, the Reasonable Country of Origin Inquiry and their conclusion on a form to be sent to the SEC (Form SD) and placed on their publicly available website. Otherwise, if the due diligence is unable to rule out the possibility that their conflict minerals were extracted in the DRC region, they must file a more complex 'Conflict Minerals Report'¹⁵ (which also requires an independent auditor's due diligence certification), draft a list of products that have not been found to be 'DRC conflict free'¹⁶ and make it publicly available on the company's website.

Only a few days after the release of the SEC regulation, the National Association of Manufacturers, the US Chamber of Commerce and the Business Roundtable challenged it in federal court.¹⁷ Of the three issues raised by the plaintiffs, the third concerned the fact that 'the requirement to describe products as "having not been found to be DRC conflict free"' represented a free speech violation. After the Washington DC District Court had found none of the arguments compelling, at appeal the Circuit Court confirmed two-thirds of the previous judgment but reversed it in the part where it did not recognize that the requirement to label products as specified violates corporate free speech rights. Reheard in 2015 upon request of the SEC and Amnesty International,¹⁸ the judgment was recently confirmed.¹⁹

In the court's opinion, which utilizes the technicality of law to redefine the patterns of transnational

governance, the majority touches upon several interesting elements and offers an oriented reconstruction of precedents in conjunction with a surgical elaboration of terminological distinctions. In particular, the judges define the publication of a statement on a webpage as non-commercial speech and therefore apply a ‘*more searching First Amendment standard*’,²⁰ namely a more liberal approach in favour of corporate free speech and against mandatory requirements. However, the most important element is represented by the court’s and appellants’ construction of the paradigm of ‘regulation by information’ as a corporate–state–consumer relationship that is constructed around positive ‘exceptional’ information that increases consumption, or unclear messages that can generate confusion and therefore does not define consumption.²¹ As explained below, the decision of the court and the position of the plaintiffs reveal the intrinsic flaws of certification as a system of corporate governance and diffused accountability: theoretically based on the free flow of information and the possibility for empowered consumers to shape companies’ behaviours, it is, on the contrary, deeply rooted in partiality and silence.

Reading the final decision of the court, it is clear how concerned judges are about the negative implications of information and transparency. According to the majority in the court, a statute that compels an issuer to define its products as ‘not found to be “DRC conflict free”’ would be the same as requiring the issuer to ‘confess blood on its hands’ and would therefore ‘interfere with the exercise of the freedom of speech under the First Amendment’.²² Even if the Dodd-Frank Act and the SEC regulation only require the issuer to disclose geographical and factual information about the source of component minerals contained in the products, the court concludes that this information would invite public scrutiny and would marginalize the issuers as the ‘scarlet letter’ segregated Hester Prynne.²³ Therefore, no public authority – including Congress – should have the power and the legitimacy to require an issuer to publish on a website a statement that would make consumers conclude that ‘its products are ethically tainted’ or that may convey ‘moral responsibility for the Congo war’.²⁴

For the appellants, the problem does not rely on the disclosure requirement, but on the way in which certain information has to be communicated and consumers informed. As indicated in Judge Srinivasan’s dissenting opinion:

[a]ppellants raise no First Amendment objection to the obligation to find out which of their products fail to qualify as ‘DRC conflict free’ within the meaning of the statutory definition. Nor do they challenge the obligation to list those products in a report for investors. [...] they object only to the Rule’s requirement to describe the listed products with the catchphrase ‘not been found to be “DRC conflict free.”’²⁵

The corporate position, which is affirmed/legitimated by the judgment of the court, reveals that issuers and producers are not trying to impede the disclosure of certain negative information, but they are mainly interested in avoiding the use of a straightforward sentence that would allow consumers to immediately understand the link between the products and the situation of instability and exploitation that is characteristic of certain mines in DRC.

As Fleming discusses in his contribution to this volume, certifications and statements become a ‘tactical truth-telling’, a visual way to inoculate a particular construction of the value chain. In this neoliberal wonderland, respect for national and international laws becomes an exception that can be marketed, while links with slave labour and armed groups are concealed and tagged as controversial or misleading for the public and presented to consumers in a confusing manner so that they cannot be fully understood and therefore cannot affect purchasing behaviours. On the other hand, the use of the freedom of speech argument and support for the certification system reveal capital’s attempts to smuggle a small, albeit somewhat confusing, dose of truth into the illusion of self-governance, codes of conduct, public statements, sustainability certifications and ecolabels. Issuers use ‘certain truths in an attempt to defend broader discursive settings that on their own would be considered false’, a condition that ‘helps maintain the illusion’ that consumers are actually informed and therefore can make a difference (see Fleming, this volume).

Conclusion

The use of certifications and labels as instruments of corporate control assumes that transparency in the market and competition will reward virtuous producers and sanction their competitors. However, the *NMA II* case presented in this article exposes the existence of a strong economic interest behind

asymmetry of information and the selective use of logos. Companies and businesses may accept being regulated by the market as long as they have the power to determine what information is available to consumers and to present it in the way that best suits their economic interests. Moreover, the effectiveness of market-based solutions on market-generated negative externalities is also frustrated by capital concentration as a crucial feature of oligopolistic capitalism. Let's think, for example, about the case of Annie's Homegrown, a socially responsible company that uses natural and organic ingredients and advocates for mandatory labelling of genetically modified food (Crooks, 2014).

In 2014 General Mills, a company that unleashed \$2 million to fight against the very same state-based labelling initiatives Annie's supports (Crooks, 2014; Solomon, 2014), realized the economic opportunity behind the fact that '[p]owerful consumer shifts toward products with simple, organic and natural ingredients from companies that share consumers' core values show no signs of letting up' and acquired Annie's Homegrown (Solomon, 2014). The extra profits generated from the exceptionalism of organic production and communication transparency will thus be appropriated by the same capital that is making money out of the 'normalization' of genetically modified products and misinformation of consumers. And the same is happening with Monsanto, the GMO-seeds company that has been buying producers of heirloom and non-GMOs seeds (Investment Watch, 2013).

As a reaction to the inherent flaws of self-regulation and to the inactivity of many governments, there has been a surge in the number of actions that try to expose the true cost of products and provide consumers with more appropriate information about their value chains. Among these, it is worth recalling 'Buycott' – a digital application that 'helps you to organize your everyday consumer spending so you can fund causes you support and avoid funding those you disagree with' and that takes into account ownership and the hidden financial links (www.buycott.com). On the workers' side, in 2014 a campaign aimed at consumers involved Tesco workers replacing price tags in the supermarkets with fake labels in support of their 'living wage action' in order to create a buyer-worker alliance against capitalist exploitation (McAteer, 2014). Different is the case of the anti-occupation actions that are continuously realized in the framework of the Boycott, Divest and Sanction (BDS) campaign, where goods that are produced illegally

in Israeli settlements or whose issuers profit from the occupation of Palestine are removed from the shelves so that they no longer represent a purchasing alternative (BDS Movement, 2010).

Although interesting, all these initiatives are too local or dependent on consumers' activism to produce an effective redefinition of current forms of production. In particular, they remain entrapped in the paradigm of consumption as a transforming power and can hardly cope with capital's mobility and accumulation strategies. For this reason, a democratic, open, widespread, coercive and publicly accessible system of control appears to be the trajectory to follow. Even in the current framework of World Trade Organization (WTO) rules, governments can still impose qualitative requirements on some products that are imported within their territories and sanction violations of these rules.²⁶ One example is the European Union Timber Regulation, which introduces a system of mandatory certification and sanctions for anyone who introduces into a member state timber that was obtained illegally (Gereats and Natens, 2014). Finally, California and the UK – among others – have introduced national legal architectures that may be utilized to challenge labour violations committed along the supply chain, independently from their geography and the nationality of the perpetrator.²⁷

In the era of Facebook and smartphones, a critical engagement with corporations and capitalism should be particularly cautious when it comes to the quality of available information and the use of shiny logos and market-based remedies for exploitation and private accumulation. The proliferation of labels and information overdose are neoliberal tactics that exploit exceptionalism to fill (wealthy) consumers' desire to change the world while hiding the root causes of deprivation and inequality (Marks, 2011). It is a matter of law, policy, culture and language. The socio-economic inequality of capitalist production cannot be properly addressed as long as 'organic', 'slave-free' and 'conflict-free' are labels and sources of extra profit while 'inorganic', 'tainted with slavery' and 'supporting armed conflict' are the hidden normality rather than being a source of accountability.²⁸

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1 We could think of the indication of fat and sugar content on food packaging as a form of reverse ecolabelling. However, these indications only concern the nutritional content of the food and do not say anything about the way in which products are obtained. Despite this limited implication, reforms to nutritional labelling and public interventions that make it easier for consumers to understand the health consequences of food have been strongly opposed throughout the world.

2 The notion of 'no-logo' adopted here has nothing do to with the idea proposed by Naomi Klein in her homonymous book, but concerns the absence of logos aimed at hiding the history of exploitation behind consumer goods (Klein, 1999).

3 However, it would be a mistake to think that these negative features of transnational production are a prerogative of the Global South: inequality and disposable lives are a reality in the Global North too.

4 I call this strategy the 'critical legal chain' approach and discuss it in my PhD. See T Ferrando (2015) *Land and Territory in Global Production: A Critical Legal Chain Analysis*, PhD Thesis, Sciences Po Law School, 23 October 23, on file with the author.

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- 5 Unilever Fish Sustainability Initiative https://www.unilever.com/Images/unilevers-fish-sustainability-initiative_tcm244-424822_1_en.pdf
- 6 The logo can be used by French producers after a feasibility study has been carried out by the competent authority, FranceAgriMer. The results of the study that led to the adoption of the scheme are available from http://www.franceagrimer.fr/content/download/11596/80130/file/ETUDEECOLABEL_080208.pdf.
- 7 For a list of the articles and reports published by the WRM, see <http://wrn.org.uy/?s=FSC>.
- 8 The group FS-Watch is very active in collecting critiques concerning FSC standards' role in favouring 'greenwashing' and land-grabbing. See <http://fsc-watch.com>.
- 9 According do D'haeze et al, the coffee boom in Vietnam has led to 'soil erosion, water scarcity and social inequality resulting in conflicts between migrants and the indigenous tribes' (D'haeze et al, 2005: 59).
- 10 *National Association of Manufacturers v SEC*, 956 F Supp 2d 43, 61 (DDC 2013); revised in part by *National Association of Manufacturers v SEC*, 748 F3d 359 (DC Cir 2014), overruled by *American Meat Institute v US Department of Agriculture*, 760 F3d 18, 22–23 (DC Cir 2014, hereafter *NAM*); confirmed by *National Association of Manufacturers v SEC*, No 13–5252 (DC Cir 19 August 2015, hereafter *NAM II*).
- 11 Conflict Minerals, 77 Fed Reg 56,274, 56, 276 (12 September 2012) (codified at 17 CFR pts 204.13p-1 & 249b.400).
- 12 Pub L No 111–203, 124 Stat 1376 (2010) (codified as amended in scattered sections of the US Code). I am aware of the unexpected negative consequences that section 1502

may have on small-scale mines and employment in the DRC. I am also conscious of the risk that a quasi-embargo of minerals originating from the DRC may have a negative impact on the economy of the country as a whole and that armed groups may resort to further exploitation and violations. Finally, the fact that the provisions are circumscribed to the mining sector and to the DRC region gives a neocolonial flavour to the whole mechanism. However, there is no doubt that the certification scheme and the compulsory disclosure represent an interesting legal innovation that needs to be further explored. In addition, the immediate attack that was launched by industry representatives is important evidence of the impact that such measures may have on their value chains and production practices.

- 13 The minerals in question are tantalum, tin, tungsten and gold, which are essential components in electronics, including smartphones and computers. However, these minerals (that are technically metals) are not specifically listed in the legislation, which only refers to the mineral ores from which they are extracted (coltan, cassiterite and wolframite, respectively) and their derivatives. See 15 USC §78m(p)(1)(E).
- 14 According to the regulation, a product is not conflict free if it contains or may contain minerals sourced from mines controlled by armed groups in the Congo region. See 15 USC §78m(p)(1)(A)(ii).
- 15 The report includes a list of the items, a description of the due diligence and an independent auditor's certification confirming (i) that the company inquiry conformed in all material respects to a 'recognized due diligence framework' and (ii) that the diligence that the company actually conducted matches what it described in its Conflict Minerals Report.

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- 16 See Form SD, OMB No: 3235–0697, Item 1.01(c)(2) available from
<http://www.sec.gov/about/forms/formsd.pdf>.
- 17 On 22 October 2012, the US Chamber of Commerce and the National Association of
Manufacturers (petitioners) filed an Amended Petition for Review with the US Court of
Appeals, District of Columbia Circuit. The petitioners requested that the new Conflict
Minerals Rule be modified or set aside in whole or in part. For more details, see n 8
above. See also Conflict Minerals Law Blog, available at
<http://www.conflictmineralslaw.com/tag/nam>.
- 18 The request for the *en banc* rehearing was based on the possible inconsistency between
the April 2014 decision and a case that was debated at the time before the same court,
American Meat Institute (AMI), which dealt with the compatibility between mandatory
requirements for commercial speech (geographical origin) and the First Amendment.
Source *NAM II, Petition by intervenors-appelles for panel rehearing and rehearing en
banc*, 29 May 2014. For more information on Amnesty International’s position vis-à-vis
the conflict minerals regulation, see Amnesty International and Global Witness, 2015.
- 19 Ibid.
- 20 *NAM II*, Judge Srinivasan dissenting opinion, at 10. In addition, they play with the
bifurcation between facts and opinions, with the notion of the uncontroversial, and also
on whether or not the catchphrase ‘not found to be “DRC conflict free”’ should be
considered differently from an indication of geographical origin (the forced disclosure of
which was accepted by AMI (*American Meat Institute v US Department of Agriculture*,
760 F3d 18 (DC Cir 2014) (*en banc*)).
- 21 The European Commission recognizes that: ‘The proliferation of labels may create

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- confusion rather than facilitate purchasing. Organisations, surveys and studies point to a risk of information overload and the need for clearer and more reliable labels.’ (European Commission, 2012: 27). See also Harbaug et al (2011) on label confusion and the reduction of the value of labelling.
- 22 *NAM II*, at 24.
- 23 *NAM II*, Judge Srinivasan dissenting opinion, at 5. See also Appellant Br 52
- 24 *Ibid.*
- 25 *Ibid.*
- 26 I am thinking, for example, of the interpretative opportunities offered by the General Exceptions included in GATT Article XX. For example, paras (b) and (g) of Article XX authorize WTO members to adopt policy measures that are inconsistent with GATT disciplines but necessary to protect human, animal or plant life or health (para (b)), or relating to the conservation of exhaustible natural resources (para (g)). See WTO rules and environment policies: GATT Exceptions https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm.
- 27 For example, the California Transparency in Supply Chains Act 2010 requires manufacturers who do business in the State of California and have gross worldwide sales of over \$100 million to be transparent about their efforts to eradicate slavery and human trafficking in their supply chain. As a consequence, firms have started requiring certification from their suppliers and controlling the chain of production. Similarly, the UK Modern Slavery Act 2015 requires large UK-based firms to release information showing they are taking steps to ensure none of the businesses with which they trade use slave labour. Certainly problematic, these two national legislations demonstrate that

courts and states can still intervene in defining the way in which production takes place all over the world. See Modern Slavery Act 2015

<http://www.legislation.gov.uk/ukpga/2015/30/introduction/enacted>; California

Transparency in Supply Chains Act of 2010 (Cal Civ Code §1714.43)

[http://leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-](http://leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_bill_20100930_chaptered.html)

[0700/sb_657_bill_20100930_chaptered.html](http://leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_bill_20100930_chaptered.html).

- 28 Mary Kane Butters, farmer, clearly articulates this point when she says: ‘I think we need to take back our language. I want to call my organic carrots “carrots” and let [other farmers] call theirs a chemical carrot. And they can list all of the ingredients that they use instead of me having to be certified. The burden is on us to prove something. Let them prove that they use only 30 chemicals instead of 50 to produce an apple.’ Source www.cornucopia.org.